United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 22-0620**
	)	**Issued: September 26, 2022**
U.S. POSTAL SERVICE, PEYTON POST OFFICE, Peyton, CO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 20, 2022 appellant filed a timely appeal from a March 7, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On October 17, 2019 appellant, then a 42-year-old delivery/sales services and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on October 14, 2019 she

[1] 5 U.S.C. § 8101 *et seq*.

sustained a left shoulder strain when lifting a heavy parcel while in the performance of duty. OWCP accepted the claim for a left shoulder strain.

On January 20, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a January 6, 2021 report, Dr. Jack L. Rook, a Board-certified physiatrist, provided a tentative diagnosis of neurogenic pain of uncertain etiology in the right shoulder region. He noted that the magnetic resonance imaging (MRI) scan of appellant's shoulder joint and brachial plexus was normal with no evidence of focal or diffuse thickening or mass. Dr. Rook noted additional treatment options and indicated that appellant would decide how to proceed with her treatment options, following which a determination could be made regarding maximum medical improvement (MMI).

On January 16, 2021 Dr. Rook completed an upper extremity permanent impairment evaluation form and opined that appellant had 13 percent permanent impairment based on range of motion (ROM) impairment methodology and 1 percent permanent impairment based on diagnosis-based impairment (DBI) methodology for the accepted left shoulder strain. Copies of Tables 15-5 and 15-34 from the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[2] and a *Quick*DASH worksheet were received with notations and information circled.

In a January 15, 2021 report, Dr. Rook opined that appellant's condition had stabilized and that she had reached MMI. He noted that, while she continued with compelling left shoulder pain around her anterior shoulder and pectoral muscle, the diagnostic testing, including an electrodiagnostic study and a brachial plexus MRI scan, were unrevealing. Utilizing the A.M.A., *Guides*, Dr. Rook opined that appellant had a final upper extremity permanent impairment rating of one percent for a left shoulder strain under the DBI methodology. Under Table 15-5 page 401 of the A.M.A., *Guides*, he found a class of diagnosis (CDX), left shoulder strain, a class 1 impairment with a default value of one percent. Dr. Rook assigned a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 1, and a grade modifier for clinical studies (GMCS) of 0. He applied the net adjustment formula and found a net adjustment of 0, which resulted in the final one percent permanent impairment of the left upper extremity. Dr. Rook also provided ROM measurements in triplicate for both the left and right shoulder. For the left shoulder, he found flexion of 125 degrees, extension of 10 degrees, abduction of 90 degrees, adduction of 10 degrees, external rotation of 70 degrees, and internal rotation of 35 degrees.[3] Dr. Rook indicated that this resulted in a final rating of 13 percent permanent impairment of the left shoulder. As the ROM methodology yielded the highest permanent impairment, he opined that appellant had 13 percent permanent impairment of the left upper extremity.

On March 18, 2021 OWCP prepared a statement of accepted facts (SOAF), which reflected that appellant's claim was accepted for left shoulder strain.

[2] A.M.A., *Guides* (6th ed. 2009).

[3] Dr. Rook also listed the ROM measurements for the right shoulder.

In a March 25, 2021 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA), reviewed the March 18, 2021 SOAF and the medical record. In applying the A.M.A., *Guides* to Dr. Rook's evaluation findings, Dr. Katz determined that appellant had 2 percent permanent impairment of the left shoulder under the DBI methodology and 10 percent permanent impairment under the ROM methodology. Under the DBI methodology, he referenced Table 15-5 of the A.M.A., *Guides* and found CDX, shoulder strain, class 1 impairment with default impairment value of 1 percent. Dr. Katz reported a GMFH of 2, a GMPE of 2 and a GMCS of 0.[4] He found a net adjustment of +1, which resulted in a class 1, grade D or two percent permanent impairment. Under the ROM methodology, Dr. Katz found 10 percent permanent left upper extremity impairment as Dr. Rook did not take into account the baseline impairment of the contralateral shoulder. As the ROM methodology yielded the highest impairment, he recommended that appellant had 10 percent permanent impairment of the left upper extremity. Dr. Katz further opined that MMI was reached on January 15, 2021, the date of Dr. Rook's permanent impairment evaluation.

On March 26, 2021 OWCP forwarded Dr. Katz' impairment report to Dr. Rook for review and requested clarification of his permanent impairment calculations. Dr. Rook was afforded 30 days to reply. No response was received.

On August 3, 2021 OWCP referred appellant, along with the medical record and an addendum to the SOAF dated July 28, 2021, to Dr. Arnold G. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation of her accepted condition(s), her functional capabilities, and limitations, her ability to be gainfully employed, the medical necessity for continued therapy, and a permanent impairment rating of appellant's left upper extremity.

In a September 18, 2021 report, Dr. Smith noted appellant's history of the injury and her medical course. He indicated that, by January 2021, she had been injured more than one year and her pain had not been relieved, noting that physical therapy and message therapy had been of no value. Dr. Smith provided an impression of left shoulder strain and possible cervical spine injury. He noted that, while Dr. Rook had opined that appellant had reached MMI on January 15, 2021, her loss of range of motion of the shoulder and pain complaints could not be objectively explained by imaging or other tests. Dr. Smith requested that appellant undergo an MRI scan of her cervical spine before he offered a permanent impairment rating.

Appellant underwent a cervical spine MRI scan on November 5, 2021.

In a December 16, 2021 addendum report, Dr. Smith indicated that the current cervical spine MRI scan showed an abnormality at C5-C6 with disc space narrowing and osteophyte formation. He opined that this may suggest that appellant had not reached MMI because her cervical condition had never been investigated as it was assumed that her shoulder region was responsible for her pain. For this reason, Dr. Smith concluded that it was not appropriate to render a permanent impairment rating.

[4] The Board notes Dr. Rook had reported GMFH of 2, GMPE of 1, and GMCS of 0.

By decision dated March 7, 2022, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing federal regulations,[6] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants.[7] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[8] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[9]

A claimant has the burden of proof under FECA to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury entitling him or her to a schedule award.[10] OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[11] Its procedures further provide that, if a claimant has not submitted a permanent impairment evaluation, it should request a detailed report that includes a discussion of how the impairment rating was calculated.[12] If the claimant does not provide an impairment evaluation and there is no indication of permanent

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] *D.P.*, Docket No. 20-1330 (issued February 19, 2021); *D.S.*, Docket No. 18-1140 (issued January 29, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

[10] *D.P., id.*; *M.G.*, Docket No. 19-0823 (issued September 17, 2019); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[11] *Supra* note 8 at Chapter 2.808.5 (March 2017).

[12] *Id.* at Chapter 2.808.6a (March 2017).

impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.[13]

ANALYSIS

The Board finds that this case is not in posture for decision.

On January 20, 2021 appellant filed a claim for a schedule award. Following the DMA's review of Dr. Rook's January 15, 2021 permanent impairment report, OWCP requested clarification from Dr. Rook on March 26, 2021. However, Dr. Rook did not respond to the request.

OWCP proceeded to develop the evidence and sent appellant for a second opinion evaluation with Dr. Smith, who examined appellant on September 18, 2021. In an addendum report dated December 16, 2021, Dr. Smith indicated that a November 5, 2021 cervical spine MRI scan showed an abnormality at C5-C6 with disc space narrowing and osteophyte formation. He opined that this may suggest that appellant had not reached MMI. Dr. Smith explained that appellant's cervical condition had not been investigated as it was assumed that her shoulder condition was responsible for her pain. However, appellant's shoulder condition could not fully explain her continuing pain complaints. Dr. Smith concluded that it was not yet appropriate to render a permanent impairment rating, without further exploration of appellant's cervical condition.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[14] Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[15]

Dr. Smith opined that further medical investigation of appellant's continuing symptoms was needed, specifically regarding her cervical condition. In light of that finding, he concluded that it was premature to render a permanent impairment rating of appellant's accepted conditions. This case must, therefore, be remanded for a supplemental opinion by Dr. Smith to determine whether there are any additional conditions causally related to the October 14, 2019 employment injury, and then whether a permanent impairment evaluation can be conducted of all of appellant's accepted conditions. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

[13] *Id*. at Chapter 2.808.6c (March 2017).

[14] *See C.L.*, Docket No. 20-1631 (issued December 8, 2021); *J.C.*, Docket No. 20-0064 (issued September 4, 2020); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[15] *See S.A.*, Docket No. 18-1024 (issued March 12, 2020l); *R.S.*, Docket No. 17-0344 (issued February 15, 2019); *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Richard F. Williams*, 55 ECAB 343, 346 (2004).

CONCLUSION

The Board finds that this case not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 26, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board